STATE OF MICHIGAN

COURT OF APPEALS

JEANNETTE M. WOLF,

Plaintiff-Appellee/Cross-Appellant,

v

PINKERTON'S, INC.,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
April 8, 2003

No. 228970
Genesee Circuit Court
LC No. 97-055173-CL

Before: Whitbeck, C.J., and Griffin and Owens, JJ.

WHITBECK, C.J. (*concurring in part and dissenting in part*).

I agree with the majority's conclusions respecting Pinkerton's motion for JNOV with respect to Wolf's WPA claim, as well as their disposition of Wolf's issues on cross-appeal. However, I respectfully dissent from the majority's conclusion that the trial court properly denied Pinkerton's motion for JNOV on Wolf's gender discrimination claim, because, in my view, Wolf did not suffer an adverse employment action as a matter of law.

I. Standard Of Review

We review de novo the trial court's decision on a motion for JNOV.[1]

II. Legal Standards

When reviewing a decision on a motion for JNOV, we view the evidence and all legitimate inferences in the light most favorable to the nonmoving party.[2] The motion should only be granted where the evidence, when viewed in the light most favorable to the nonmoving party, fails to establish a claim as a matter of law.[3] If reasonable jurors honestly could have

[1] *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 395; 628 NW2d 86 (2001).

[2] *Orzel v Scott Drug Co*, 449 Mich 550, 557; 537 NW2d 208 (1995).

[3] *Id*. at 558.

reached different conclusions based upon the evidence, neither the trial court nor this Court may substitute its judgment for that of the jury.[4]

III. Adverse Employment Action

A. Material Adversity

Wolf argues that the fire guard position, although not involving a pay increase, was viewed as a desirable position because it involved working inside the plant, had a predictable schedule, and did not require work on weekends. However, to establish a prima facie discrimination case, the adverse action must be "*materially* adverse";[5] differences in job duties that are a "mere inconvenience" do not suffice.[6] I agree with the trial court's observation that these alleged differences in duties and schedules were matters of convenience rather than material adversity.

The Sixth Circuit Court of Appeals has taken a similar view. In *Kocsis v Multi-Care Mgt, Inc*, for example, the plaintiff, a nurse, was transferred to a position that, although the pay and benefits were identical, required her to lift and maneuver patients, and therefore was "much more physically demanding" than her previous position had been.[7] The appeals court upheld the trial court's grant of summary disposition on the ground that this was not an adverse employment action as a matter of law.[8] Similarly, it seems that refusing Wolf the opportunity to work indoors on a regular weekday schedule, of itself, did not rise to the level of material adversity required to sustain a discrimination action.[9]

B. Objective Evidence

Although the trial court found no evidence of material adversity in the difference in working conditions, it held that Wolf suffered a materially adverse action because testimony indicated that "people who worked as fire guards got promoted." However, the only evidence to support this conclusion appears to have been the testimony of Ron Aubin, a former fire guard, to the effect that the fire guard position gave employees the added advantage of "learning another position to grow within the company." Neither the trial testimony nor Wolf's appellate brief offers any objective evidence that Pinkerton's promoted fire guards at a faster rate than security officers. Because "there must be some objective basis for demonstrating that the change is

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[4] *Hamann v Ridge Tool Co*, 213 Mich App 252, 254; 539 NW2d 753 (1995).

[5] *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 363; 597 NW2d 250 (1999) (emphasis added).

[6] *Id*. at 364, quoting *Crady v Liberty Nat'l Bank & Trust Co*, 993 F2d 132, 136 (CA 7, 1993).

[7] *Kocsis v Multi-Care Mgt, Inc*, 97 F3d 876, 879-880 (CA 6, 1996).

[8] *Id*. at 886-887.

[9] *Wilcoxon, supra* at 363-364; *Kocsis, supra* at 885; *Crady, supra* at 136.

adverse" to establish an adverse employment action,[10] I believe the trial court erred in concluding that Wolf satisfied this element of her claim.[11]

For these reasons, in my view, Wolf did not suffer an adverse employment action as a matter of law, and the trial court therefore erred in denying Pinkerton's motion for JNOV.[12] Accordingly, I respectfully dissent in part.

/s/ William C. Whitbeck

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[10] *Wilcoxon, supra* at 364; see also *Serna v City of San Antonio*, 244 F3d 479, 485 (CA 5, 2001) (no adverse action where the plaintiff presented no objective evidence that his chances for promotion were reduced by his transfer to a subjectively less desirable position).

[11] *Wilcoxon, supra* at 364; *Serna, supra* at 485.

[12] *Orzel, supra* at 558.